Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR, MNR, MNDC, MNSD, FF (Landlord's Application)
MT, CNR, MNR, MNDC, MNSD (Tenant's Application)

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenant on March 16, 2015 and by the Landlord on March 18, 2015.

The Landlord applied for: an Order of Possession for unpaid rent and utilities; a Monetary Order for unpaid rent and utilities; money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; and, to recover the filing fee from the Tenant.

The Tenant applied for the following: to cancel the notice to end tenancy for unpaid rent and utilities; for more time to cancel the notice to end tenancy; for a Monetary Order for emergency repairs; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and, for the return of the Tenant's security deposit.

Both parties appeared for the hearing and provided affirmed testimony. The hearing process was explained and the parties had no questions about the proceedings. Both parties were given a full opportunity to present evidence, make submissions to me, and to cross examine the other party on the evidence provided.

Preliminary Issues

The Landlord confirmed receipt of the Tenant's Application and her documentary evidence by registered mail. The Tenant confirmed receipt of the Landlord's Application but denied receipt of the Landlord's documentary evidence.

On examination of the Landlord's documentary evidence, I determined that the Landlord had only provided a copy of the notice to end tenancy and the residential tenancy agreement. However, the Tenant had also provided a copy of the same documents in

her documentary evidence. Therefore, I continued to allow the Landlord's evidence as this was already in the possession of the Tenant.

Issue(s) to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to a Monetary Order for unpaid rent for March 2015 and lost rent for April, 2015?
- Is the Tenant entitled to cancel the notice to end tenancy?
- Is the Tenant entitled to any monetary compensation?
- What is to happen with the Tenant's security deposit?

Background and Evidence

The parties confirmed that this tenancy started on October 1, 2014 for a fixed term of one nine months due to end on June 30, 2015. A tenancy agreement was signed by the parties which established rent payable by the Tenant in the amount of $900.00 on the 30th of each month. The Tenant paid the Landlord a $450.00 security deposit on September 26, 2014 which is still retained by the Landlord.

At the start of the hearing, the Tenant explained that she had vacated the rental unit on April 1, 2015; however, the Tenant did explain that she was coming back and forth to the rental unit to deal with a dispute she was having with the Landlord about a stove and refrigerator she had purchased during the tenancy and whether the Landlord wanted them to remain in the rental unit after she had left. The Landlord testified that he was not sure if the Tenant was telling the truth about vacating the rental unit and he was under the impression that the Tenant was still residing there as he had been given no formal notice that the Tenant had fully vacated.

The Tenant testified that she had sent the Landlord multiple text messages at the end of March 2015 informing him that she would be vacating the rental suite on April 1, 2015. The Landlord still sought an Order of Possession for the rental home and the Tenant did not have any dispute with the Landlord being issued with an Order of Possession.

The Landlord testified that the Tenant had provided him with postdated rent cheques at the start of the tenancy. However, when he attempted to cash the Tenant's rent cheque for March 2015, the rent cheque bounced. As a result, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") by posting it to the Tenant's door on March 6, 2015. The Notice had a vacancy date of

March 16, 2015 due to unpaid rent in the amount of $900.00 due on March 2, 2015. The Landlord confirmed that the payment for March 2015 rent was due on February 28, 2015. The Landlord now seeks to recover unpaid rent for the month of March 2015 and lost rent for April 2015 for a total amount of $1,900.00.

The Tenant confirmed receipt of the Notice on March 6, 2015 and made her Application to dispute the Notice on March 16, 2015. The Tenant acknowledged that this was outside of the five day time limit as explained on the second page of the Notice.

The Tenant confirmed that she had put stop payments on the March and April 2015 rent cheques she had provided to the Landlord at the start of the tenancy. The Tenant testified that in February 2015, the Landlord served her with a previous 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice") and a 1 Month Notice to End Tenancy for Cause (the "1 Month Notice") because the rental suite was an illegal suite.

The Tenant explained that she had applied to cancel the 1 Month Notice and the 10 Day Notice for which a hearing was held on February 19, 2015. The file number for this hearing appears on the front page of this decision. The Tenant provided conflicting and confusing testimony about the outcome of the February 19, 2015 hearing which the Landlord disputed. As a result, the parties allowed me to read the previous decision dated February 19, 2015 during the hearing from the Residential Tenancy Branch records. The decision states in part:

> *"At the outset of the hearing, the tenant testified that she filed her Application to dispute the landlord's 1 Month Notice. The tenant claimed for this relief in her Application. The tenant then changed her testimony to state that she did not intend to dispute the 1 Month Notice, as she received it after she filed her Application. Throughout the hearing, the tenant repeatedly changed her testimony to indicate that she did and then did not intend to dispute the 1 Month Notice. The tenant stated that she was new to the hearing process and that she did not understand the relief she was claiming, despite the fact that I clarified the relief with her several times throughout the hearing. The tenant made the same testimony changes with respect to the 10 Day Notice but finally confirmed that she did intend to dispute the 10 Day Notice.*
>
> *The tenant stated that she wished to withdraw her application to cancel the 1 Month Notice. The tenant indicated that she intended to secure witnesses and serve written evidence prior to a future hearing to cancel the 1 Month Notice. I advised the tenant about the consequences of withdrawing this relief, noting the*

presumptive end to the tenancy if an application is not filed by the deadlines outlined in the Act. I advised the tenant that she would not be permitted to withdraw her application to cancel the 1 Month Notice, only to file the same application later. The tenant insisted that she wished to withdraw her application to cancel the 1 Month Notice, which is hereby withdrawn."

[Reproduced as written]

The Tenant explained that she got the 1 Month Notice from the Landlord because the rental unit was not in compliance with the city bylaws. The Tenant explained that as a result, the Landlord repeatedly asked the Tenant to leave the rental unit through verbal threats for this reason. The Tenant testified that she contacted the city who informed her that the Landlord should be issuing her with a two month notice to end tenancy with one month's free rent because it was the Landlord's failure to bring the rental suite up to code that led to the ending of her tenancy. The Tenant testified that she tried to work with the Landlord to resolve the issue of her having to leave the rental unit but the Landlord was insistent on her having to leave.

The Tenant argued that the Landlord owed her one month's rent as compensation for ending the tenancy and this is the reason why she put a stop payment for the March 2015 rent cheque. The Tenant testified that as she had disputed the Notice, she had the right to continue to not pay rent until a determination had been made on her Application.

While the Tenant acknowledged that she was liable to pay rent for March 2015, the Tenant argued that she should not be responsible for April 2015 rent because she had moved out on April 1, 2015. When the Tenant was questioned about how the Landlord would have been in a position to re-rent the rental unit on April 1, 2015 when she was still occupying it on this date, the Tenant explained that the Landlord could not have re-rented the suite because it was an illegal suite.

The Tenant was asked whether she had any formal documentation from the city which required the Tenant to vacate the rental unit. The Tenant provided the case file number from the city which she explained was the case that dealt with this tenancy. The Tenant also provided a photograph which shows a "Site Visit Notice" from the city regarding non permitted construction the Landlord was carrying out which she referred to as the Landlord's termination of the rental agreement.

The Tenant was asked about her monetary claim as disclosed on her Application in the amount of $1,920.00. The Tenant explained that she was however, now seeking a total amount of $5,090.00 from the Landlord. The Tenant was informed about the requirement to amend an Application as set out in Rule 2.11 of the Rules of Procedure.

This rule requires a party making a change on their Application, such as an increase in their monetary claim, to amend the Application and re-serve this to the respondent to put them on notice of the amendment. Therefore, I have only considered the Tenant's monetary claim as it appeared on her Application.

The Tenant explained that the $1,920.00 comprised of one month's rent which the Landlord was required to give because the Landlord ended the fixed term tenancy through the 1 Month Notice which should have been a two month notice with compensation.

The Tenant testified that the Landlord had failed to compensate her for a fridge and stove which she purchased at the start of the tenancy in the amount of $290.00 for which she had provided receipts for. The $450.00 related to the return of the Tenant's security deposit. The remaining $280.00 related to moving costs as a result of the Landlord ending the tenancy with the Notice which only gave her ten days to vacate the rental suite.

The Landlord disputed the Tenant's testimony and arguments. The Landlord testified that the previous 1 Month Notice and 10 Day Notice had already been dealt with in the previous hearing. The Landlord submitted that the tenancy was ended because the Tenant had put a stop payment on her March 2015 rent cheque. The Landlord stated that the Tenant had no grounds to compensation under the 1 Month Notice and that this matter was not relevant to the Notice.

The Landlord pointed to the decision dated February 27, 2015 and submitted that it had already dealt with the Tenant's claim for compensation for the stove and fridge as follows:

> "*The tenant requests a monetary order in the total amount of $4,500.00. The tenant indicated that she replaced an old fridge and stove in her rental unit with new appliances at her own cost. She stated that the landlord refused to fix these old appliances that were dirty and in bad condition. The tenant indicated that she advised the landlord in July 2014 that the stove was damaged prior to her commencing the tenancy. The landlord stated that the tenant advised him that the fridge and stove were too old. The landlord indicated that the tenant agreed to rent the unit in its original condition, as documented in the condition inspection report, which the landlord says the tenant signed. No condition inspection report was provided by either party. The landlord stated that the tenant moved the old stove and fridge outside the rental unit without his permission. The tenant requests compensation for these appliances, stating that she paid $95.00 for the*

stove and $200.00 for the fridge. The tenant did not provide any documentary evidence, including receipts or photographs, with respect to this monetary request. Accordingly, the tenant is not entitled to compensation for the fridge and stove that she claims to have purchased for the rental unit."

[Reproduced as written]

When the Tenant was informed that the issue of the stove and fridge replacement had already been addressed in the previous hearing, the Tenant explained that she had now submitted receipts for the appliances for this hearing; the Tenant stated that she had failed to submit the receipts for the previous hearing which was the reason why her claim was previously denied. When the Tenant was informed that I was not at liberty to deal with a matter that had already been previously determined as governed by Section 77(3) of the Act , the Tenant threatened that if I were to deny her this part of the claim, she would take my decision to review or simply make the Application for the same issue again until she got what she wanted.

Analysis

In examining the Notice, I find that it was completed with the required contents that complied with Section 52 of the Act. I also accept the undisputed evidence that the Notice was served to the Tenant in accordance with Section 88(g) of the Act.

The Tenant confirmed receipt of the Notice on March 6, 2015 and made the Application to dispute the Notice on March 16, 2015, being ten days after she had received the Notice. While I find that the Tenant applied to dispute the Notice outside of the five day time limit provided by Section 46(4) of the Act, I take into consideration the Tenant's testimony that she has now moved out of the rental suite, and grant the Landlord an Order of Possession. This order is effective two days after service on the Tenant and is enforceable though the Supreme Court of British Columbia. As the Landlord has been granted an Order of Possession for the above reasons, I accordingly dismiss the Tenant's Application to cancel the Notice and for more time to cancel the Notice as these issues are now moot.

In relation to the Landlord's monetary claim for unpaid rent for March 2015 and lost rent for April 2015, I make the following findings. Section 26(1) of the Act requires a tenant to pay rent when it is due under a tenancy agreement **whether or not the landlord complies with the Act**, unless the tenant has a right to deduct all or a portion of the rent. Notwithstanding the Tenant's arguments that she felt that the Landlord was forcing her to end the tenancy with a 1 Month Notice because the rental unit was not compliant

with the city by-laws, the evidence in this case points to the tenancy being ended by the Landlord because the Tenant had failed to pay rent for March, 2015.

The previous Arbitrator had determined that the 10 Day Notice was to be cancelled and the tenancy was to continue until it was ended in accordance with the Act. Therefore, the Tenant failed to pay rent and the Landlord rightly served the Tenant with the second Notice. The Tenant had the option of paying the outstanding rent or applying to dispute the Notice within five days. However, I find that the reasons presented by the Tenant for withholding her March 2015 rent are not sufficient authority for her not to pay rent that was payable under her tenancy agreement.

I find the Tenant was not allowed to withhold rent based on a determination she made that the Landlord had failed to comply with the Act by issuing her with a two month notice to end the tenancy and had failed to give her compensation. Therefore, I find that as the tenancy was ended correctly by the Landlord with the Notice, which was a remedy the Landlord had under the Act, the Tenant is liable for March 2015 rent in the amount of $900.00.

As I have determined that the tenancy was legally ended by the Landlord based on the Tenant's breach of the Act in not paying rent, I deny the Tenant's claim for moving costs based on her assertions that she was forced out of the tenancy with only ten days of notice. Furthermore, a 1 Month Notice does not require a Tenant be compensated. As I have made a finding that the tenancy ended in accordance with the Act, I also deny the Tenant's claim for one month's compensation for having her tenancy ended through the Notice.

In relation to the Landlord's claim for lost rent of April 2015, I have taken into consideration Policy Guideline 5 to the Act which provides guidance on mitigating loss when making claims for loss of rental income. The guideline explains in part:

> "*Where the landlord gives a notice to end tenancy and is entitled to claim damages for loss of rental income, the landlord's obligation to re-rent the rental unit or site begins after the relevant dispute period set out in the Residential Tenancy Act or the Manufactured Home Park Tenancy Act have expired. If the tenant files an application to dispute the notice, the landlord is not required to find a new tenant until the arbitration decision and order are received, the time limits for a review application have passed, and, where a review application is made by the tenant, after the review decision is received by the landlord*."
>
> [Reproduced as written]

The Tenant's oral evidence was that she had moved out of the rental suite on April 1, 2015 after she gave text message notice to the Landlord at the end of March 2015. However, even if I accept the Tenant's testimony that she gave the Landlord written notice at the end of March 2015 and left the rental unit on April 1, 2015, then this still would not have given sufficient time for the Landlord to re-rent the home for April 1, 2015 in order to mitigate this loss.

Furthermore, the Tenant had applied to dispute and cancel the Notice and therefore, the Landlord would not have been in a position to re-rent the suite for April 2015. In addition, I find there is not sufficient evidence before me that the Landlord was prevented from re-renting the suite by the city; it is plausible that the city may have asked the Landlord to comply with their by-laws, but the city by-laws do not govern or supersede the Act. Based on the foregoing, I find that the Tenant is also responsible for the Landlord's loss of rent for April, 2015 in the amount of $900.00

In relation to the Tenant's claim for the cost of the stove and fridge replacement, I find that this matter was already dealt with in the previous hearing as detailed above. I attempted to explain the issue of *res judicata* to the Tenant during the hearing but the Tenant did not understand or agree with me on this matter.

The doctrine of *res judicata* prevents a party from obtaining another day in court after the first lawsuit is concluded by giving a different reason. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit are bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. A final judgment on the merits bars further claims by the same parties based on the same cause of action.

Res judicata prevents a party from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. *Res judicata* also prevents a party from arguing issues that should have been before the court in a previous action.

It is important for the Tenant to understand that if she is unsuccessful in a previous hearing, she does not have an automatic right to continue making Applications to re-argue the same issue again after submitting new evidence to support that same claim. On this basis, I dismiss the Tenant's claim for the cost of the fridge and stove replacement as this matter has already been decided upon in the previous hearing.

As the Landlord has been successful in this matter, the Landlord is also entitled to recover from the Tenant the $50.00 filing fee for the cost of this Application, pursuant to Section 72(1) of the Act. Therefore, the total amount payable by the Tenant to the Landlord is **$1,850.00** ($900.00 + $900.00 + $50.00).

As the Landlord already holds the Tenant's **$450.00** security deposit, I order the Landlord to retain this amount in partial satisfaction of the claim awarded, pursuant to Section 72(2) (b) of the Act. As a result, the Tenant's Application for the return of her security deposit is dismissed.

The Landlord is awarded the outstanding balance of **$1,400.00** ($1,850.00 - $450.00). This order must be served on the Tenant and may then be filed in the Small Claims Court and enforced as an order of that court.

Conclusion

The Landlord is granted an Order of Possession. The Tenant has breached the Act by not paying rent in accordance with her tenancy agreement and the requirements of the Act. Therefore, the Landlord may keep the Tenant's security deposit and is issued with a Monetary Order for the outstanding balance in the amount of $1,400.00.

The Tenant's Application is dismissed in its entirety **without** leave to re-apply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 22, 2015

Residential Tenancy Branch